

**MINUTES
HAMPTON ZONING BOARD OF ADJUSTMENT
THURSDAY, APRIL 28, 2005**

MEMBERS PRESENT: Mike Kennedy, Chairman
 Robert V. Lessard, Vice Chairman
 Jack Lessard (sitting in for Jennifer Truesdale)
 Tom McGuirk

OTHERS PRESENT: Kevin Schultz, Building Inspector
 Shirley Doheny, Recording Secretary

The chairman called the meeting to order at 7:05 p.m.

17-05 The petition of Alan Berman for property located at 8 Bittersweet Lane seeking relief from Articles 1.3, 4.5.1 and 4.5.2 to replace a front and side porch and an expanded wraparound porch/deck that would further encroach into the front and left side setbacks. This property is located at Map 282, Lot 160 in a RB Zone.

Jack Lessard read the petition. Allen Berman, 8 Bittersweet Lane came to the table to speak on this petition. Mr. Berman stated that the lot size was 50.61 feet across the front and 60 feet on the sides, the rear line is same as front. Property consists of a single family dwelling 958 square feet in size. Mr. Berman reiterated the Articles which they were seeking relief from 1.3, 4.5.1 and 4.5.2. He then drew attention to the pictures that were included in the packets. There were pictures of the subject property as well as nearby properties that had porches, decks, etc. that extended into the side yards and front yard areas. This shows how this would be common to the neighborhood. He then showed a sketch of what presently exists compared to what is being proposed. The proposal will lesson the encroachment into the side yard as far as the width but they would be bringing it forward along the side yard into the front yard. From the nearest point of the railing that leads up the steps onto the front porch would only be 1'3" closer to the street than the railing that already exists.

Mr. Berman then went through his responses to the 5 criteria as submitted with the petition. He also mentioned that they sent letters to all the abutters and that they all responded favorably.

Questions from the Board

Kevin Schulz asked if this was his own personal single residence and if this would affect any parking. Mr. Berman said they live in Connecticut but this would not be a rental property and it would not affect any parking.

Comments from the Audience

None, however Mr. Kennedy advised that there are six letters in the file from abutters supporting it.

Comments from the Board

Mr. Lessard Moved to Approve the variances as requested, SECONDED by Jack Lessard. Chairman, Mike Kennedy polled the Board, and the Board agrees the five criteria were met.

VOTE: 4-0 UNANIMOUS

PETITION GRANTED

18-05 The petition of David & Tanya Divone for property located at 9 Belmont Circle seeking relief from Articles 1.3 and 4.5 as to 4.5.1 front setback in order to add a second floor addition to the existing single story ranch. This property is located at Map 108, Lot 3 in a RA Zone.

David & Tanya Divone came to the table to discuss the petition. He first presented a petition signed by all the neighbors on the block indicating no objection. They would like to add an addition to their three bedroom ranch. He stated that with three kids and his mother living in the house they need more room. Also he said that ten out of the fourteen houses on the block have second levels. Mr. Divone then read through his responses to the 5 criteria as submitted with the petition.

Questions from the Board

None

Comments from the audience

None

Back to board

Jack Lessard moved to approve the petition, SECONDED by Tom McGuirk. Chairman, Mike Kennedy polled the Board, and the Board agrees the five criteria were met.

VOTE: 4-0 UNANIMOUS

PETITION GRANTED

19-05 The petition of M&M Realty Partnership for property located at 263 Drakeside Road seeking relief from Articles 4.1.1, 4.7 and 8.2.3 to construct 26 2-bedroom units in two buildings on a lot area of 3.03 acres and in the process enlarge both existing buildings. This property is located at Map 157, Lot 1 in a G Zone.

John Daly from Pierce Atwood representing M & M Realty Partnership and Robert McDermott came to the table to discuss the petition. Atty. Daly began with an observation that variances being requested were previously granted in 2003. They have scaled down the proposal to eliminate variances that legally are no longer necessary. The Board viewed a set of plans referenced as C1 and C2. C1 representing the existing condition of the property and C2 the proposed property.

The property's original use was Walker's farm and has since that time been used as an office building.

Atty. Daly stated that granting the variance would not be contrary to public interest. Proposed residential condominium use is compatible with current existing uses and proposed improvements would benefit the surrounding properties. It is also believed that the Town as a whole would benefit.

Atty. Daly then addressed the five criteria for the Board.

Vic Lessard asked if the project would be for 55 years and over. He asked how it will benefit if surrounding properties are 55 and over. It is believed that the surrounding properties are age restricted but could not be determined for certain at this time. Mr. Lessard said that if it is true that the surrounding properties are age restricted, he would like to have this property restricted. Atty. Daly acknowledged the point but questioned if this is an issue to come before this board. Kevin Schulz acknowledged that many of the surrounding properties are age restricted but because of so many new projects he cannot be sure of all without checking further. Atty. Daly would not commit to this project being age restricted but did say that it is something that might be worth considering. Kevin Schultz asked how many bedrooms are proposed. He was told two in each unit.

Mr. Kennedy asked if there were any other questions from the board.

Comments from the audience

None

It was noted that it had been approved without restriction before. Mr. Kennedy agreed that age restricted would be good but he also stated that the Board could not use that as the criteria. Seeing nobody in the audience Mr. Kennedy brought it back to the Board. He asked if they were splitting an existing structure into two. The proposal is to split it and on the third floor there is a catwalk going over. Mr. Kennedy asked if there were wetlands on this property. No wetlands on property. Kevin Schulz mentioned that the property was currently on septic and would be put on municipal. Mr. McDermott stated that water and sewer were up to the property line. Vic Lessard stated that water had been brought up but not sewer. Mr. McDermott believes that he paid to bring the sewer to the property line. Mr. Lessard disagrees. Applicant stipulated that the project couldn't be done without sewer. If it is not up to the property line they will do so.

Jack Lessard expressed concern about not having age restriction. Vic Lessard stated that he is not ready to vote tonight. There are too many open ends. Mr. Kennedy questioned what the open ends other than the sewer are.

Vic Lessard motioned to move this petition to next month's meeting. Mr. Kennedy wanted to quantify what were the answers that Mr. Lessard was looking for and asked what answers were needed for Mr. Lessard to be ready. Atty. Daly stated that they wanted to address the Board's concerns, but they need to know what that is.

Tom McGuirk motioned to approve the petition as written. Mr. Kennedy stated that this Board cannot consider age restriction and the Petitioner does not have to show a positive impact on the community, it just has to show that it doesn't have a negative impact on the community. Mr. Kennedy seconded the motion. He then asked the

members if they thought the five criteria were met. Vic Lessard abstained. Mr. McGuirk, Mr. Kennedy and Jack Lessard agreed that the criteria had been met.

VOTE: 2-1

Motion Failed

Vic Lessard motioned to continue to next month's meeting. At this time Atty. Daly asked a point of order. He questioned if the Board voted 3-0 that the criteria has been satisfied. How does the Board then vote 2-1 to deny the variance? Mr. Kennedy agreed that if it does satisfy the criteria then the Board has met the burden and is not allowed to add a burden to that.

Mr. Kennedy stated that he would ask the Board one more time if the criteria has been met and then recall the vote which was a motion by Mr. McGuirk and seconded by Mr. Kennedy to approve the petition as written. After more discussion, this included Mr. McDermott stating that the units will be built in existing structure. Also, that the plans were not drawn up for age restriction. It might be considered and explored but he cannot say whether it can be done or not.

Mr. McGuirk agreed the criteria have been met, Jack Lessard agreed the criteria have been met, Vic Lessard agreed the criteria have been met and Mr. Kennedy agreed the criteria was met. The motion was again moved.

VOTE: 4-0 UNANIMOUS

PETITION GRANTED

20-05 The petition of Seven-0-Nine Ocean Boulevard Realty Trust for property located at 437 Winnacunnet Road seeking relief from Articles 2.3.7(c)(a)(2), 4.7, 8.2.3, 8.2.4 and 8.2.6 to remove the existing apartment building and replace with a single building containing 11 condominium units where the density conforms to 4.1.1 but 34,717 square feet of the 84,425 square feet total area is not "upland", the building is less than 40 feet from lot lines, and the 2 visitor parking spaces are less than 25 feet from the front of the building and less than 20 feet from the road. This property is located at Map 221, Lot 11 in a RB Zone.

Peter Saari of Casassa and Ryan and Shannon from TMS Architect came to the table. Their objective was to do something different than what everyone thinks of when they think of condominium. Shannon explained that an effort was made to make this building, even though it is a condominium, fit in with a good portion of the older buildings on Winnacunnet Road. He then showed other buildings along certain parts of Winnacunnet Road that were three story, the third story being within the roof line, most of them having dormers or gable end buildings with living space on the third floor. The existing building is approximately eighty feet consisting of smaller additions that have been combined over the years. He showed that the proposed building is approximately sixty-eight feet wide. The proposed building is longer therefore deeper into the lot. The driveway is moved from the left side to the right side in the proposal. Parking for eleven-unit condominium is underneath, plus extra for two visitor spots. There is an area fenced in for dumpster and a couple areas for optional snow storage. There are four units on first and second floors. The third floor has two smaller units and one larger unit.

Atty. Saari discussed the variances that they were looking for. Regarding the limitation of eight units per structure, he stated that they were trying to avoid the appearance of having eight units in a row attached to each other. They do not

comply with the forty-foot setbacks. They have about the same setbacks as the present building. The proposed structure has 24 feet on one side and 27 feet on the other. The ordinance requires that the parking be 25 feet away from the front of the building. They feel that people driving in would be more comfortable with parking in the front. He also discussed that the spaces were less than 20 feet from the road. As far as the criteria, they believe that it is in keeping with other structures in the area. It is permitted use. Because of the narrowness of the lot, it is better to keep it in the front of the lot rather than pushing it back toward the wetlands. It is consistent with the spirit of the ordinance. They don't feel that splitting the building would accomplish anything as far as having eight units in the building. As far as property values, he stated the surrounding neighborhood is already multi family, in some cases less dense and in some more dense.

Questions from the Board

None

Comments from the Audience

None

Back to the Board

Mr. Kennedy reiterated that the only thing that infringes on the 20-foot buffer is the driveway. The building does not. Tom McGuirk agrees with Vic that it is a great project but questioned why the parking needs to be 25 foot from the building. Mr. Kennedy said it is one of the requirements.

Jack Lessard moved to approve the petition, SECONDED by Tom McGuirk. Chairman, Mike Kennedy polled the Board and the Board agrees the five criteria were met.

VOTE: 4-0 UNANIMOUS

PETITION GRANTED

21-05 The petition of Alfred & Joyce Charpentier for property located at 15 Diane Lane seeking relief from Articles 1.3 and 4.5.1 to demolish existing dwelling and replace with a dwelling with a 13' front setback where 20' is required. This property is located at Map 282, Lot 192 in a RB Zone.

Henry Harrison Boyd Jr. from Millennium Engineering and Sean Connery came to the table. Mr. Boyd stated that the plans say Parker Engineering but that they have changed the Parker name to their corporate name of Millennium Engineering.

The existing house needs updating. The house in the proposed condition will be better for owners to enjoy and would beautify the situation, which would benefit Diane Lane and the beach. The setback they are requesting is 12.5 foot, which is better than the current 11.6 foot setback. Sean read the criteria as submitted to the Board.

Questions from the Board

Vic Lessard questioned why they didn't put the parking on the side of the house. He stated that they do park in the front now, but it would fit on the side. Tom McGuirk mentioned that although they have that spot now, with the construction going on at the beach they might not have it later.

Vic Lessard moved to approve the variance, SECONDED by Jack Lessard. Chairman, Mike Kennedy polled the Board and the Board agrees the five criteria were met.

VOTE: 4-0 UNANIMOUS

PETITION GRANTED

22-05 The petition of Frederick & Catherine Bohenko for property located at 5 Church Street, Unit 3 seeking relief from Articles 1.3 (as to 8.2.3 and 8.2.6) to add a second floor to an existing non-conforming condominium unit which would not be closer to the lot lines and other buildings than at present, but would not meet the 40-foot setback or 20-foot buffer requirements. This property is located at Map 275, Lot 47 in a BS Zone.

23-05 The petition of William & Cheri Halberstadt for property located at 5 Church Street, Unit 2 seeking relief from Articles 1.3 (as to 8.2.3 and 8.2.6) to add a second floor to an existing non-conforming condominium unit which would not be closer to the lot lines and other buildings than at present, but would not meet the 40-foot setback or 20-foot buffer requirements. This property is located at Map 275, Lot 47 in a BS Zone.

Peter Saari and Mrs. Halberstadt came to the table. Atty. Saari stated that 22 and 23 are the same and that he would be saying the same thing regarding both. The criteria are the same on both but the setbacks are different. The Board agrees to hear the two together using the same set of criteria.

These are five separate freestanding condominium units. They are talking about Units 2 and 3. These are approximately 600 sq. feet each. They are essentially doubling this by adding a bathroom and making a more normal size living space. The building is exact copy of existing building, building up. Bedrooms added will have closets and they will have a full bathroom.

As far as the criteria, these particular buildings are set back from the street and can't be seen when passed by. Impact on the public is non-existent. They can't expand out the only way is up. This is consistent with the spirit of ordinance. In order to draw people to Hampton Beach they need a little room to move around their dwelling. The public doesn't gain anything by denying this and they lose a lot. There has been no opposition from abutters.

Comments from the audience

None

Vic Lessard moved to approve both petitions, SECONDED by Jack Lessard. Chairman, Mike Kennedy polled the Board and the Board agrees the five criteria were met.

VOTE: 4-0 UNANIMOUS

PETITION GRANTED

Public session was completed at 8:55.

Five minute break

BUSINESS MEETING:

Motion for rehearing of petition 02-05 (292 Winnacunnet Road)

The Board discussed the petition, which is a motion for rehearing on an administrative appeal. To rehear the Board's decision to uphold building inspector's determination that the construction at 292 Winnacunnet Road was a dwelling unit. The petitioner's are saying that this is not a dwelling unit as defined in zoning ordinance because things are not independent and that the cooking facilities and sanitation facilities are not complete and that there are no permanent cooking facilities. There is a double oven mounted in wall. The cooktop is not hooked up it is installed. The Board agrees that they do have independent living facilities and that there is a permanent provision for cooking, eating, sleeping and living. Petitioner says they can't wash dishes in the kitchen. Board feels they could be washed in bathroom. The petitioners contend this is a recreational facility. They talk about it being subordinate because it provides an extra bedroom and bathroom and handicapped accessible gathering room and the utilities come through the main house and no rent is charged. Sewer is tied into house sewer. Vic Lessard asked if they have permits to hook in. Kevin stated that he believes they received the proper permits to hook up the sewer. Board believes this is not an accessory use but is a full use. Petitioners also say decision is unreasonable because Kevin had sent a letter stating that if they installed a kitchen it would be prohibited. They took great pains to not create a kitchen. The Board disagrees and feels that it is a kitchen. The Board agrees there is no reason to rehear this.

Vic Lessard moved to not rehear. SECONDED by Jack Lessard.

VOTE: 4-0 UNANIMOUS to not rehear

There is a second part to this, which goes to the imminent life safety issue, whether or not we can revisit the imminent life safety issue. The petitioners say there was no imminent threat. The inspection report disclosed three items that presented a potential threat. These were a wire breach in the firewall, a 1" X 4" hole in the wall and reinstallation of weather stripping in doors. The question is do those pose a threat? Mr. Kennedy stated that there is a breach of the fire code by having a firewall that is not a firewall anymore. He feels that when there is a fire issue you have a threat to life and safety. The petitioners also stated that it was unreasonable because the Building Inspector's initial decision to post the entire building was made in the absence of any inspection that would prove that. Board feels the whole building must be posted. The Petitioners also stated that there was no imminent threat because the Building Inspector did not provide notices of required corrective actions between November 19th and March 1st despite the RSAs. Vic Lessard disagrees with them. The petitioners also state that the threat to petitioner's health and safety arising from Kevin's overzealousness is much more imminent than from the violation. Board offered to give time to correct the issues. The Board had previously told them that if they could show the Board that they had made the corrections that they would stay the posting for the new addition. They have not done that. Kevin Schultz stated that as of today's date we have received in writing an acknowledgement that they believe they have corrected the items that were of concern. We responded that it appears from the list of things that they have done

they have addressed the issues, but a reinspection would be required to confirm that these things have been done. The petitioners were advised, in writing that they need to call Mr. Schultz's office to schedule a reinspection in order to confirm. At this time the Board has not been able to confirm that the corrections they have been required to make have been done.

Vic Lessard moved to not rehear. SECONDED by Jack Lessard.

VOTE: 4-0 UNANIMOUS to not rehear

Once the Building Inspector affirms that the corrections have been made the Board can issue an order which will allow them to use the new construction for a recreation space only. The order would also give Kevin the right to go in at anytime and confirm that this is the case.

11-05 Request for extension was not necessary because new variances were granted tonight.

04-05 and 05-05 Mr. Kennedy requested taking them together because there are about nine differences between the two. The petitioner's position is that the decision is illegal because they met the five criteria. The first point being that he showed sufficient evidence that it would not be contrary to the public interest because the construction would decrease nonconforming use, be more esthetically appealing and will bring more in line with the overall neighborhood. While agreeing that these may be in the public interest, Mr. Kennedy stated that the public interest is also served by segregating the properties. This is an RA Zone and granting the variance for multiple units is not in the public interest. Mr. Kennedy is not aware of any variances granted to significantly enlarge a nonconforming use in that area. The petitioner also states that the restriction interferes with his use of the land because it is already a three family so it is unique in the area because it is a preexisting, legal nonconforming lot. Mr. Kennedy stated that the State says that you have a nonconforming use as long as the buildings stay in use. Once you tear down the building you lose grandfather ability to rebuild them. The board feels that by tearing it down he needs to then get a variance to put in the multi-family rather than expand. The petitioner contends he is not expanding this use because he is bringing it down to two units or bringing it down to one building with three units and that under a case, believed to be a Salem case, this doesn't meet the criteria for expansion. Mr. Kennedy found that when there is no definition the courts will put in a criteria like that, however we have a specific definition for expansion of a nonconforming and it includes an increase in size. Mr. Kennedy addressed the bad faith or negligence claims: Two reasons given by the petitioner were that other similar projects have received ZBA approval. Mr. Kennedy's answer to that is the Board has not been shown any variances granted for removing two grandfathered buildings and replacing them with two larger buildings. Nor, any variances to significantly expand the nonconforming use beyond simple growth. The second reason he mentions is that the Board shouldn't have considered his expansion because he doesn't think it is an expansion. Mr. Kennedy stated that under our ordinances it is expansion. Mr. Kennedy also commented about the BOCHA requirement that the benefit cannot be achieved by any other reasonably feasible method. On the petitioner's requests for rehearing, he says on one that it can only be achieved by building a three unit, single building and on the other he says it can only be done by building two single unit buildings. The Board has no recollection of

granting someone the right to put a two family or multi family in this RA Zone since it was made an RA Zone.

Jack Lessard motioned not to rehear. SECONDED by Tom McGuirk.

VOTE: 4-0 UNANIMOUS not to rehear both petitions.

Mr. Kennedy asked to put the notes regarding the response for rehearing in the record. The Board had no objection. Response for rehearing entered into record as part of the Board's answer.

The next item on the agenda is adopting the Rules of Procedure.

Vic Lessard expressed concern about people not being in attendance at the meeting. Mr. Kennedy went through the rules calling out some of the changes. The first change was under the heading of Meetings.

4. added that the Clerk shall preside if Chair and Vice-Chair are unable.
5. added that they can change the order of business as long as the Board concurs.

Under General Procedures

4. allows the Board through a majority vote to set a time limit on a petition
8. added a provision to ask persons who violate this procedure to be asked to leave the hearing room
12. was reworded for clarity

Under Procedure for Specific Requests

- 1i. The Board will grant the variances collectively.
- Request for rehearing was added. These will be done during the business session.

Under Application and Decision

Mr. Kennedy asked for input on the Board regarding #3. It is at the discretion of the Board after review of the agenda to move smaller petitions to the beginning.

Under Re-Adoption

2. and 3. were added

Vic Lessard motioned to adopt Rules of Procedure. SECONDED by Jack Lessard.

VOTE: 4-0 UNANIMOUS to adopt rules

7. Minutes from last meeting accepted as presented

Vic Lessard motioned to accept. SECONDED by Tom McGuirk.

VOTE: 4-0 UNANIMOUS to accept the minutes

Mr. Kennedy announced that he would like to talk about 707 Ocean Boulevard for clarification. Peter Saari talked about 707 Ocean Boulevard reminded the Board about what had already happened in this matter. It was brought to Kevin's attention regarding the building being 50-foot high. The question being asked is whether they need an additional variance where there is no additional building in the setbacks. The question is was the variance granted for the amount of building in the setback rather than the specific configuration. The planning board was made aware of variance that was granted. They did not need a variance for the 50-foot high building. Kevin asked if the articles of relief were granted and everything else he does within the project does not violate our ordinances, whether minor or substantial in change, is there a violation of the variance granted. Mr. Kennedy referred to another petition where the Town Attorney advised him that with more building in the setback they would need to get the variance again. Unlike that case, in this case, they are putting less building in the setback. Mr. Kennedy asked if the Board could agree that in granting a dimensional variance for a setback that what they are granting a variance for is the amount of the building that can impinge on that setback area rather than the specific configuration, as long as it doesn't violate any other variance. All members agreed that when they interpret the zoning ordinance, when they grant a dimensional setback they are granting it for the volume of the building that is going into the setback. Kevin read Peter Saari's letter, which stated the original building presented to the Zoning Board had 8400 square foot of building. The plans approved by the Planning Board showed a volume of 7800 square foot building. The amount of building within the setback went down 23 percent in footprint size and 6 percent in volume. The end result is less volume of building in the setbacks.

Vic Lessard motioned to interpret the ordinance this way. SECONDED

VOTE: 4-0 UNANIMOUS

Motion to adjourn by Jack Lessard, Tom McGuirk seconded. Meeting adjourned at 10:10